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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 71-4824

WILLIAM E. SEWELL,

Petitioner

versus

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of William E. Sewell for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit made and entered by that court on the 7th day of July, 1971, a copy of which is hereto appended, respectfully shows to this Honorable Court:

OPINIONS OF THE COURTS BELOW

The opinion and judgment of the United States District Court for the Middle District of Alabama, Northern Division, was entered July 9, 1970, and is unreported. A copy of the opinion and judgment is annexed to this petition as Appendix I.

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered July 7, 1971, is not reported, a copy of which is annexed to this petition as Appendix II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the date of its entry is July 7, 1971.

There was no order respecting a rehearing, and there was no order granting an extension of time within which to petition for certiorari.

The decision of the court of appeals sought to be reviewed:

(a) Has decided important questions of federal law which have not been, but should be, settled by this court.

(b) Has decided a federal question in a way in conflict with applicable decisions of this court.

(c) Is in conflict with the decisions of other courts of appeals on the same matter.

(d) Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The statutory provision believed to confer jurisdiction upon this court to review the judgment of the court below is United States Code, Title 28, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the United States has a policy that conflicts with the policy adopted by the Congress that its courts should protect the rights of individual labor union members denominated collectively as the "Bill of Rights of Members of Labor Organizations," under the Labor-Management Reporting and Disclosure Act of 1959(LMRDA), 29 U.S.C. section 411 (a), by exercising the power to enforce such rights under 29 U.S.C. section 412.

(2) Whether or not under federal law a union member is guilty of disloyalty to the union as his employer, in urging other members of his union to vote in a referendum to reject a proposed amendment to the union's constitution, contrary to instructions given him by the union's officers who proposed the adoption of the amendment.

(3) Whether or not under federal law a claim by a union member that his union violated his membership rights is "in its essential nature," a claim arising from a contract between the member and his union and governed by a State statute of limitations applicable to actions upon a simple contract.

(4) Whether or not under federal law the public interest requires that a labor

organization have the power to discipline an employee-member for expressing to other members his opposition to the adoption of a proposed amendment to the union's constitution, contrary to instructions given to him by the union's officers that he work among the members and urge them to vote for the adoption of the proposed amendment.

(5) Whether or not under federal law a union may lawfully discipline a member for expressing his views to other members concerning a matter referred to the membership for decision, where the totality of his conduct, including his statements, is not contrary to the responsibility of every member toward the organization as an institution and would not interfere with the organization's performance of its legal or contractual obligations.

(6) Whether or not the court below in its decision has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision, in that, without any evidence in the record pertaining to the duties which petitioner was employed to perform for the respondent, the court assumed as a fact that one of said duties was a duty to support the political position taken by the Executive Council of respondent in a referendum proposing an amendment to the union's constitution, thereby interposing on behalf of respondent, and sustaining by its judgment, a defense which the respondent failed to plead in the district court.

STATUTES WHICH THE CASE INVOLVES

Federal and State of Alabama statutes are involved in this case. The federal statute is the Labor-Management Reporting and Disclosure

Act of 1959 (LMRDA), 73 Stat. 519-546, 29 U.S.C. sections 401, et seq. The provisions of said statute which are deemed pertinent to the decision of the questions presented for review read as follows:

Sec. 101. (a) (1) EQUAL RIGHTS. - Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws. 73 Stat. 522, 29 U.S.C. section 411 (a) (1).

(2) FREEDOM OF SPEECH AND ASSEMBLY. - Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. 73 Stat. 522, 29 U.S.C. section 411 (a) (2).

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect. 73 Stat.

523, 29 U.S.C. section 411 (b).

Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located. 73 Stat. 523, 29 U.S.C. section 412.

Sec. 103. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law before any court or other tribunal, or under the constitution and bylaws of any labor organization. 73 Stat. 523, 29 U.S.C. section 413.

Sec. 201. (a) Every labor organization shall adopt a constitution and by laws and shall file a copy thereof with the Secretary, ***. 73 Stat. 524, 29 U.S.C. section 431 (a).

Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section. 73 Stat. 541, 29 U.S.C. Sec. 529.

An Alabama statute involved and upon

which the respondent relies is set forth in Title 7, Section 26 of the Alabama Code of 1958, as follows:

> "Section 26. Limitation of one year. - The following must be commenced within one year:
>
> ***
>
> "Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated."

Another Alabama statute, Alabama Code Title 7, Section 21, contended by petitioner to be applicable to this action, is as follows:

> "Section 21. Limitation of six years. - The following must be commenced within six years:
>
> ***
>
> "Actions upon any simple contract or specialty, not herein specifically enumerated."

STATEMENT OF THE CASE

This action was instituted in the United States District Court for the Middle District of Alabama, Northern Division, by petitioner William E. Sewell against the respondent The Grand Lodge of the International Association of Machinists and Aerospace Workers (Union). Sewell alleges that he is a member of the Union and was employed by it as a Grand Lodge Representative, and that his employment as such was unlawfully terminated by the president of the Union, because he exercised the

rights of free speech and assembly guaranteed to him in section 101 (a) (2) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. section 411 (a) (2), and enforced through section 609, 29 U.S.C. section 529. The basis of the jurisdiction of the district court is section 102 of the Act (29 U.S.C. section 412).

Sewell seeks (a) reinstatment of his employment as Grand Lodge Representative, (b) compensatory damages for losses sustained, (c) exemplary damages, and (d) other appropriate relief. The Union responded by filing a motion to dismiss contending, first, that the complaint did not state a claim upon which relief could be granted, and second, that the claim was barred by the Alabama statute of limitations of one year applicable to "Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated." The district court granted the Union's motion to dismiss the complaint for failure to state a claim upon which relief could be granted, the district court stating:

> "In a case such as the one now before the Court, a plaintiff must, in order to state a claim upon which relief can be granted, make appropriate allegations that he has been subjected to some disciplinary action that affects his membership in the organization."

The district court did not, therefore, reach or pass upon the defense of the statute of limitations of one year.

Sewell appealed from the judgment of the district court to the United States Court of Appeals for the Fifth Circuit. The appeal

presented the issue of whether or not it is unlawful for a labor organization to discipline a member by discharging him as its employee for exercising his political rights of free speech, guaranteed by 29 U.S.C. section 411 (a) (2), where the Union does not suspend or expel such member from his membership in the Union.

The Court of Appeals affirmed the result reached, i.e., the dismissal of the action, albeit for reasons not identical with those assigned by the district court. The court below held, first, that the cause of action is governed and barred by the Alabama Statute of Limitations of one year. The court below then stated:

> "Even if Sewell's complaint was not barred by the statute of limitations, we are of the opinion that he should be denied relief."

Thereafter, the court below assumed the existence of a fact, without anything appearing in the record in this action or in the record of any proceedings in which Sewell was a party, that one of Sewell's duties as a Grand Lodge Representative of the Union, was a duty to follow the instructions of the Union's officers directing him to campaign among the Union's members, during the holding of a referendum, and to urge the members to vote for the adoption of an amendment to the Union's constitution which had been proposed by the Union's officers. Based upon this erroneously assumed fact, the court below held that Sewell's admitted opposition to the adoption of the proposed amendment in his talks with other union members, was an act of disloyalty to the Union as his employer and that the Union was justified in terminating his

employment for insubordination, and affirmed the judgment of the district court dismissing the action.

Petitioner makes this application for writ of certiorari to issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioner respectfully shows that this is a case of great importance to petitioner, to all labor organizations and their millions of members throughout the United States, and to the public generally.

The decision of the court below decided important questions of federal law which have not been, but should be, settled by this Court, involving the construction and application of the provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), with respect to the rights of free speech and assembly secured to every member of any labor organization by section 101 (a) (1) and (2) (29 U.S.C. Section 411 (a) (1) and (2)) of the Act. The decision states that the United States has a policy which conflicts with the policy established by the Congress by the LMRDA, that the courts should protect the rights of individual labor union members specified in said Act. The decision held that a civil action brought under section 102 of the Act is governed as to the period of limitations by the Albama statute of limitations applicable to tort actions, not by the Alabama statute of limitations applicable to actions arising from contract. The decision of the court below that the petitioner should be denied relief

under the facts of his case, even if his claim was not barred by limitations, was based upon a fact outside of the record, but assumed to exist by the court below and interposed by the court in behalf of respondent. Such interposed factual defense, had it ever been available to the respondent, was waived by the respondent's failure to plead it in the district court. The decision below is in conflict with the decisions of other federal courts of appeals upon the question of whether or not free speech and assembly exercised by union member-employees concerning internal union affairs weakens unions in their dealings with employers.

CONGRESSIONAL POLICY

The courts can not pursue a policy of abstaining from interfering in the internal management of labor unions contrary to the Congressional policy that the courts should protect and grant appropriate relief to union members who are disciplined for exercising their rights of free speech and assembly. In Summers, The Law of Union Discipline: What the Courts do in Fact, 70 Yale L.J. 175(1960), it is said:

> "The Labor-Management Reporting and Disclosure Act of 1959 marks a new era in the legal regulation of internal union affairs."

This Court in N.L.R.B. v. Allis-Chalmers Mfg. Co., 87 S. Ct. 2001, at 2013, said:

> "The 1959 Landrum-Griffin amendments, (are) thought to be the first comprehensive regulation by Congress of internal union affairs,"

and quoted in note 33 from Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852, as follows:

> "The act is the first major step in the regulation of the internal affairs of labor unions. It expands the national labor policy into the area of relations between employees and the labor union. Previously national policy was confined to relationships between management and unions."

Representative Griffin, one of the managers of the Landrum-Griffin bill before the House, stated:

> "The labor reform legislation before the House at this time is directed at the regulation of the internal affairs of unions."
> 105 Cong. Rec. pages 15722-23 (1959)

The court below was plainly wrong, therefore, when it stated "This appeal illustrates the recurring problem of accommodating two conflicting policies:" It is the duty of the federal courts to grant appropriate relief to a union member who shows that his union has infringed his membership rights specified in the Bill of Rights.

There is no dispute about the fact that petitioner freely assembled with other members of respondent union and expressed his views to them concerning an internal union affair, and the fact that respondent discharged him for insubordination for so doing. Unless his claim is barred by the one year Alabama statute of limitations applicable to

tort actions, petitioner is entitled to a trial of his claim.

PETITIONER'S CLAIM IS ONE ARISING FROM CONTRACT

This action involves a determination under federal law of "the essential nature" of an action brought by a union member under section 102 charging the infringement of rights secured by section 101 (a), a question which has not been, but should be, settled by this Court, because of its importance to federal courts in the selection of the appropriate state limitations provision to be applied in such actions in future litigation.

The characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. Textile Workers v. Lincoln Mills, 353 U.S. 448, 457; Auto Workers v. Hoosier Corp.,383 U.S. 696, 706.

Professor Clyde W. Summers in his treatise, The Law of Union Discipline: What the Courts do in Fact, 70 Yale L.J. 175 (1960), at page 179 states:

> "The underlying theory defining the role of the courts in internal union affairs is that the union constitution is a contract between the union and its members."

Continuing at page 180 he states:

> "The union constitution defines the conduct for which the member can be punished, prescribes the procedure for trying him, and specifies the appeals available within the union. The court's role

is but to enforce the contract."

Professor Summers comments were made in connection with his survey of cases of union discipline decided under the laws of the State of New York. This Court, in 1958, dealing with the contract theory of the union member's action to enforce his membership rights in International Association of Machinists v. Gonzales, 356 U.S. 617, at 618-619, said:

> "This contractual conception of the relation between a member and his union widely prevails in this country and has recently been adopted by the House of Lords in Bonsor v. Musicians' Union (1956) A.C. 104. It has been the law of California for at least half a century."

This contractual conception prevails in Alabama. Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810, 843 (2); Government & Civic Employees O. Com. v. Windsor, 78 So. 2d 646, 649; Francis v. Scott, 260 Ala. 595, 72 So. 2d 98.

All of the provisions of the LMRDA heretofore set out became a part of the constitution of respondent union when it adopted the constitution and filed it with the Secretary of Labor pursuant to the mandate contained in section 201 (a)(29 U.S.C. Section 431 (a)) of the Act. 17 Am. Jur. 2d 654, section 257; 17A CJS 295, section 330; Walker v. Whitehead, 16 Wall. 314, 317 (21 L. Ed. 357); Armour Packing Co. v. U.S., 209 U.S. 56, 82; Farmers & M. Bank v. Federal Reserve Bank, 262 U.S. 649, 660; Home Bldg. & L. Ass'n. v. Blaisdell, 290 U.S. 398, 429; Wood v. Lovett, 313 U.S. 362, 370.

Respondent promised petitioner that it would not discipline him for exercising his rights of free speech and assembly, and agreed that if it did so it would be subject to a civil action by petitioner in a federal district court empowered to grant him appropriate relief for such infringement of such rights. Respondent agreed that any provision of its constitution and bylaws inconsistent with permitting its members to exercise their rights of free speech and assembly should be of no force or effect, thus preventing a member from waiving or contracting away such rights. Section 101 (b) (29 U.S.C. Section 411 (b)) of the Act.

Petitioner respectfully contends that Congress acted to regulate the contractual relationship of members to their union, and that the court below erred in characterizing this action as an action in tort and barred by the Alabama statute of limitations of one year applicable to actions not arising from contract.

Actions for injury to rights of union membership are not specifically enumerated in any provision of the Code of Alabama with respect to limitations of actions. Therefore, this action is governed by Alabama Code Title 7, section 21, providing that actions upon any simple contract or specialty, not herein specifically enumerated, shall be commenced within six years.

The respondent was not in doubt about the action being one on contract. At pages 5 and 6 of its Memorandum filed with the district court in support of its motion to dismiss, the respondent stated:

"The Grand Lodge representative

> is the employee of the Executive Council and is appointed by them for the purpose of carrying out their policies. He is under the direction of the President whose acts are subject to ratification by the Council. Copy of the Union's Constitution is being filed with this memorandum."

The court below stated:

> "For the Alabama Statute of Limitations to apply, (Title 7, section 21, governing contracts) appellant must allege and prove a valid contract under Alabama law." (Words in parenthesis ours).

The rule of this Court as stated in Conley v. Gibson, 355 U.S. 41, 47-48, is that:

> "The complaint should not be dismissed on motion unless, upon any theory, it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved in support of his claim."

Petitioner's allegation of his membership in respondent union denotes a contractual relationship between the parties under federal law, based upon the written constitution of the union.

CONFLICT OF DECISION OF COURT BELOW WITH DECISIONS OF OTHER COURTS OF APPEALS UPON THE SAME MATTER

The court below based its decision that petitioner should be denied relief, even if his claim was not barred by limitations, squarely upon its own invented fact, i.e., its unwarranted assumption that one of petitioner's duties as an employee of respondent was to obey instructions given by respondent's officers that petitioner support their position in a referendum involving a proposed amendment to the Union's constitution. The court below said:

> "To hold that a union has no right to discharge an employee under the facts of his (Sewell's) case would, we believe, seriously detract from effective, cohesive union leadership. The result might well be weak, ineffective and fragmented unions which would be paralyzed in bargaining for the rights and welfare of union members against the monolithic front of large commercial corporations in the modern commercial world."

Thus, the court below gave credence to the union argument that there is a public interest in promoting the monolithic character of unions, i.e., that the public interest requires the exercise by union leaders of power to discipline union members for exercising rights of free speech and assembly in opposing policies advocated by such leaders relating to changes in the union's constitution which are being submitted by referendum to the union membership for adoption of rejection. This argument was rejected by the Court of Appeals

for the Second Circuit in Giordani v. Upholsterers International Union of North America, 403 F. 2d 85 (1968), and in Salzhandler v. Caputo, 316 F. 2d 445 (1963), and it was rejected by the Court of Appeals for the Ninth Circuit in Grand Lodge of Internat'l Ass'n. of Machinists v. King, (1964) 335 F. 2d 340, cert. den. 379 U.S. 920. In Giordani, supra, at 89-90 of 403 F. 2d, the court noted that:

> "if unions could discipline speech on the ground that it weakened their power as an institution, this safeguard would be rendered entirely ephemeral and ineffectual."

Similarly, in Salzhander, supra, at 451 of 316 F. 2d, the court said:

> "The union argues that there is a public interest in promoting the monolithic character of unions in their dealings with employers. But the Congress weighed this factor and decided that the desirability of protecting the democratic process within the unions outweighs any possible weakening of unions in their dealings with employers which may result from the freer expression of opinions within the union."

Similarly, in King, supra, at page 346 of 335 F. 2d, the court stated:

> "Plaintiffs are appointed officials, and defendants argue that 'elected officials of any private or political organization at any level have both the responsibility and the power of their positions,

and *** the burden of the responsibility carries with it the right to appoint subordinate officials to aid in the discharge of that responsibility who are in full and complete accord with the views of the elected officer.' Plaintiffs allege they were discharged because they exercised section 101 (a) (1) and (2) rights; if defendants dispute this allegation they raise an issue of fact to be resolved at the trial. We assume, however, that defendants mean to argue that successful candidates for union office must have the right to discharge appointed union officials who expressed support for their opponents. Realistically, this is simply to argue that members appointed to union office may not actively engage in union political activities while occupying such positions. ***

"It may well be that the 'reasonable rules and regulations' exception of section 101 (a) (1) and the similar proviso of section 101 (a) (2) would permit a union to adopt the principle of 'required political neutrality *** as a sound element for efficiency,' and formulate, and apply without discrimination, regulations imposing reasonable limitations upon the political activity of union jobholders. However, the defendant union has made no effort to implement such a program, and arguments in favor of doing so cannot support defendants' contention that they should be free to discharge particular union

> employees because they are not their political partisans."

In note 21, at page 346 of 335 F. 2d, the Ninth Circuit Court of Appeals reiterated its statement that:

> "*** there is nothing to indicate that Congress believed effective union democracy required that controlling union officials have power to discharge other officers for exercising freedom of speech and assembly in internal union affairs."

The decision of the court below is clearly in conflict with the specified decisions of the courts of appeals for the Second and Ninth circuits upon the same matter pertaining to our national labor policy, and such conflict should be resolved by this Court.

THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision. The court below stated:

> "The basic facts underlying the allegations of the complaint have been subject to lengthy inquiry and extensive review prior to this appeal. Concerning these facts no dispute appears to exist since they are discussed without contradiction by the parties; moreover, these facts as argued correspond essentially with the facts found by this court in the companion case, Nix v.

NLRB."

Petitioner respectfully, but categorically, denies the court's statement that:

> "Concerning these facts no dispute appears to exist since they are discussed without contradiction by the parties; moreover, these facts as argued correspond essentially with the facts found by this court in the companion case of Nix v. NLRB."

At page 2 of the Reply Brief for Appellant, filed in the court below, we said:

> "The affirmative defense of res judicata or collateral estoppel, which Appellee argues in its brief, was not pleaded by the Appellee in the district court, and this issue may hot be considered on this appeal. Nix v. National Labor Relations Board, 418 F. 2d 1001 and cases cited in division 12 of the opinion at page 1009. We shall not, therefore, burden the Court with a lengthy discussion of the reproduced brief filed by IAMAW in that case, which appears at pages 9 to 23 of Appellant's brief herein."

Continuing to argue our disagreement with the contentions of the Appellee before the court below that one of petitioner's duties as an employee of respondent was to obey instructions given him by respondent's officers directing him to support their position on a political matter submitted by said officers

to the union membership for decision, we said at page 5 of said reply brief:

> "Appellee's attempt to justify its violation of Appellant's right of free speech as a union member upon the ground that his expression of views on an intra-union political matter violated some alleged union policy must fail. Since union members are forbidden by LMRDA from contracting away their rights of free speech by adopting an inconsistent provision in its constitution and bylaws, a fortiori, the adoption of a policy by the union hierarchy can not abridge such rights. The Court of Appeals for the Eighth Circuit in Johnson v. Nelson, 325 F. 2d, 646, at page 653, held:
>
> > "No alleged policy determination, no directive by any union official will be allowed to impair freedom of speech within the union."

And at pages 6 and 7 of said reply brief, we said:

> "The Union contends that Sewell, as a Grand Lodge Representative, was under the direction and control of its President and Executive Council, and under a duty to carry out their instructions at all times. This is true only as to instructions pertaining to the duties which Sewell was employed to perform for the Union. ***

> "The members of the Executive Council of defendant have no power to require Grand Lodge Representatives to propagandize the membership to support their political proposals. In this case, their proposal sought to diminish the degree of democratic participation by the union members in directing its affairs, by depriving them of their right to vote directly upon future proposed changes in its constitution. ***
>
> "Sewell's duty as a Grand Lodge Representative was to assist the President, as the chief organizer of the union. It was no part of his duty to espouse the views of the President and members of the Executive Council to the already organized members of the union with respect to political issues to be voted upon by the membership."

The court below was plainly wrong in stating that:

> "Concerning these facts no dispute appears to exist since they are discussed without contradiction by the parties; moreover, the facts as argued correspond essentially with the facts found by this court to exist in the companion case of Nix v. NLRB." (Emphasis ours).

It is clear that the court below based its assumption that one of petitioner's duties as an employee of respondent was a duty to obey the instructions of the union officers that he support their position in the political referendum from its own record

in Nix v. NLRB, supra. Petitioner was not a party in that case. He filed no charge with the NLRB. He was not represented by counsel in the proceedings before the Board or in the court below. He was called as a witness for the government by the General Counsel to testify before the trial examiner in support of the government's complaint. He could not and did not examine or cross-examine any witness in the proceedings. He had no right to do so. The proceedings were under the control of the Board. The Board lacked power to determine his rights under the LMRDA. Petitioner is not bound by any determination of law or fact made by the Board and sustained by the court below in Nix v. NLRB.

The National Labor Relations Board has never been given jurisdiction to enforce private rights. The Act creating the Board does not provide private persons with an administrative remedy for private wrongs. A charge of an unfair labor practice may be presented to the Board, but the person presenting the charge does not become the actor in the proceedings. The Board as a public agency acting in the public interest, is chosen as the instrument of government to assure protection to the public from the described unfair conduct in order to remove obstructions to interstate commerce, which is the prime objective of the National Labor Relations Act.

> Amalgamated Workers v. Edison Co., 339 U.S. 261, 264-265

In note 25 of its decision the court below stated:

> "The Union argues vigorously in this court that the issues

> presented in the instant case have already been adjudicated in our Nix decision. It relies on the principle of collateral estoppel and res judicata. (Citations omitted) The record does not disclose that this issue was presented in the district court and therefore we decline to consider it here."

The court below erred in interposing a defense on behalf of the respondent which, if it existed, had been waived by the respondent's failure to plead it in the district court. F.R.C.P. Rules 8 (c) and 12 (g). It compounded its error by sustaining the defense which it so interposed, and its action in so doing has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision, to correct such departure.

It will appear, therefore, that if the decision of the Court of Appeals for the Fifth Circuit is permitted to remain unreversed, the result will be that controlling union officers will continue to violate the high standards of ethical conduct which Congress requires that they observe in their dealings with other members of their unions; and that the policy established by the Congress in the LMRDA, designed to promote democratic control of unions by their members, will not likely be vigorously enforced by the federal courts.

Wherefore, your petitioner respectfully prays that writ of certiorari may be issued out of and under the seal of this court, directed to the United States Court of Appeals

for the Fifth Circuit to the end that the judgment of said court in this action may be reviewed and reversed by this Honorable Court.

William E. Sewell,

Petitioner,

By _____
William G. McRae

Counsel for Petitioner

Address:

608 Lakeshore Drive, N.E.
Atlanta, Georgia 30307
Telephone No. 404-378-2951

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Petition for Certiorari upon the respondent by mailing a copy of same, with postage first class prepaid, addressed to Adair, Goldthwaite, Stanford & Daniel, 600 Rhodes-Haverty Building, Atlanta, Georgia 30303, counsel of record for respondent.

This _____ day of September, 1971.

_____
William G. McRae

Counsel for Petitioner

APPENDIX I

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DISMISSING THIS CAUSE

(Number and Title Omitted) (Filed Jul 9, 1970)

This is a civil action filed by the plaintiff pursuant to the provisions of the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C. §§412 and 529. The defendant is The Grand Lodge of the International Association of Machinists and Aerospace Workers. Plaintiff seeks reinstatement in his employment as a Grand Lodge Representative and also asks this Court to award him compensatory and punitive damages. Plaintiff says that until January 6, 1967, he was employed by the defendant as a Grand Lodge Representative; that his duties in that capacity were to perform such assignments as should be directed by the International President of the defendant Association. Plaintiff contends that in December, 1966, the President of the defendant wrote him a letter inquiring as to whether plaintiff was opposing a proposal of the Executive Council of the defendant, which proposal was to eliminate from the constitution of the defendant the requirement that all proposed amendments to the constitution be submitted to the membership of the Union in a special post-convention referendum for acceptance or rejection.[1] Plaintiff further contends that on January 6, 1967, he was advised

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1/ For a rather comprehensive discussion of the facts leading up to and forming the basis for plaintiff's discharge as a Grand Lodge Representative, see Nix, et al. v. NLRB, 418 F. 2d 1001 (5th Cir. 1969).

by the President of the Union that his employment with International Union was terminated for insubordination; the basis for the "insubordination" was plaintiff's active opposition to the proposal of his employer. Plaintiff concludes that the termination of his employment was in violation of his rights secured to him as a member of the Union under Section 411(a)(1) and (a)(2) of the Act.

The case is submitted at this time upon the defendant's motion to dismiss. Upon consideration of the motion, the written and oral arguments made in support thereof and in opposition thereto, this Court concludes that the motion to dismiss is due to be granted.

Section 101 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. § 411) protects the rights of members of labor unions to equal rights of membership. This includes the right to nominate candidates, to vote in elections, to attend meetings, to participate in and vote upon the business of the organization, to freedom of speech and freedom of assembly, and, generally, to be free from any improper disciplinary action that might affect the members' right of membership. Nothing in this law is designed to protect the right of a member to hold office in a union. This being true, when there is a removal from office such as the office plaintiff held, that of Grand Lodge Representative, Section 101 of the Act does not protect the right to hold the office as such. In a case such as the one now before the Court, a plaintiff must, in order to state a claim upon which relief can be granted, make appropriate allegations that he has been subjected to some disciplinary action that affects his membership in the labor organization. Here, it is uncontroverted that Sewell was discharged as an employee for insubordination and

was not discharged because of his union activity as a member, and the disciplinary action taken against him did not in any way affect his union membership. Thus plaintiff fails to state a claim upon which relief can be granted.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the defendant's motion to dismiss be and the same is hereby granted. It is ORDERED that this cause be and the same is hereby dismissed, with costs taxed against the plaintiff.

Done, this the 9th day of July, 1970.

s/Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30537

WILLIAM E. SEWELL,
Plaintiff-Appellant,

versus

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

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(July 7, 1971)

Before CLARK, Associate Justice,* and GEWIN and RONEY, Circuit Judges.

GEWIN, Circuit Judge: This appeal illustrates the recurring problem of accommodating two conflicting policies: the policy that the courts should abstain from interfering with the internal management of labor un-

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*Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

ions and the policy that the courts should protect fundamental rights of individual labor union members which Congress has denominated collectively as the "Bill of Rights of Members of Labor Organizations", under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 (1959).[1]

In this action against the Grand Lodge of the International Association of Machinists and Aerospace Workers (Union) appellant Sewell, who was employed as a Grand Lodge Representative of the defendant Union, alleges that he was wrongfully discharged from his office by the president of the Union. He asserts that he was discharged because he exercised the rights of free speech and assembly guaranteed to him by the Act in sections 101(a) (1) and (2), 29 U.S.C. § 411 (a) (1) and (2),[2] and enforced through section 609,

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[1]The appellant states the issue for review in the following language:

> The sole issue presented by this appeal is whether or not it is unlawful for a labor organization to discipline a member by discharging him as its employee for exercising his political rights of free speech, guaranteed by 29 U.S.C. Section 411 (a) (2), where the Union does not suspend or expel such member from his membership in the union.

[2]29 U.S.C. § 411(a) (1) and (2) provide:

> (a) (1) Equal rights. — Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> (2) Freedom of speech and assembly. — Every member of any labor organization shall have the right to meet and assemble freely with other members; and to

29 U.S.C. § 529 which makes it unlawful to discipline a member for the exercise of these statutory rights. He seeks (a) reinstatement of his employment as Grand Lodge Representative, (b) compensatory damages for losses sustained, (c) exemplary damages, and (d) other appropriate relief. The Union answered by filing a motion to dismiss contending, first, that the complaint did not state a claim upon which relief could be granted, and second, that the complaint was barred by the applicable Alabama statute of limitations of one year.[3] The district court granted the Union's mo-

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express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

[3]The statute upon which the Union relies is set forth in Title 7, Ala. Code § 26 (1958):

Section 26. Limitation of one year. — The following must be commenced within one year:

...

Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

Alternatively, the Union contended that the action was barred by the federal policy of limitations stated in other federal statutes of limitations applicable to other federally created rights of action involving personal rights and employment rights. The federal statute relied upon are the following:

The National Labor Relations Act, as amended, Section 10(b) [29 U.S.C. 160(b)] providing for a limitation of six months upon complaints based upon unfair

tion to dismiss, concluding that Sewell's complaint failed to state a claim upon which relief could be granted.[4] We affirm the result reached, albeit for reasons not identical with those assigned by the district court.

The basic facts underlying the allegations of the com-

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labor practices, including wrongful discharge; the Fair Labor Standards Act, as amended by the Portal-to-Portal Act (29 U.S.C., Section 255) providing a limitation of two years for ordinary wage and hour and overtime claims, and three years for wilful violations; and Title VII of the Civil Rights Act of 1964 [42 U.S.C., Section 2000e-5(d)] providing a limitation of ninety days for filing of charges of discrimination in employment.

[4]The reasoning of the district court is summarized by the following excerpt from the order dismissing the cause:

> Section 101 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. § 411) protects the rights of members of labor unions to equal rights of membership. This includes the right to nominate candidates, to vote in elections, to attend meetings, to participate in and vote upon the business of the organization, to freedom of speech and freedom of assembly, and, generally, to be free from any improper disciplinary action that might affect the members' *right of membership*. Nothing in this law is designed to protect the right of a member to hold office in a union. This being true, when there is a removal from office such as the office plaintiff held, that of Grand Lodge Representative, Section 101 of the Act does not protect the right to hold the office as such. In a case such as the one now before the Court, a plaintiff must, in order to state a claim upon which relief can be granted, make appropriate allegations that he has been subjected to some disciplinary action that affects his *membership* in the labor organization. Here, it is uncontroverted that Sewell was discharged as an employee for insubordination and was not discharged because of his union activity as a member, and the disciplinary action taken against him did not in any way affect his union membership. Thus plaintiff fails to state a claim upon which relief can be granted. (emphasis in original)

plaint have been subject to lengthy inquiry and extensive review prior to this appeal. Concerning these facts no dispute appears to exist since they are discussed without contradiction by the parties; moreover, these facts as argued correspond essentially with the facts found by this court in the companion case, *Nix v. NLRB*.[8] It appears to be undisputed that Sewell was

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[8] 418 F.2d 1001 (5th Cir. 1969). In *Nix* the court found the following:

> The factual background of Sewell's discharge can be summarized as follows. Sewell received a reprimand from Siemiller on December 13, 1966, because of the brevity of his weekly reports, and was discharged on January 4, 1967, for refusing to carry out the IAM Executive Council's decision to secure elimination of IAM's post convention referendum.
>
> In October and November of 1966 the staff representatives of IAM (including Sewell) were informed of the necessity of eliminating the post-convention referendum and the support required of all staff representatives in working for its defeat. Siemiller, in a letter to Sewell on December 22, 1966, stated that he had received reports that Sewell was opposing the elimination of the referendum and requested him "to report to this office if you have been advising local lodges to vote against the proposition in January; and if you have been opposing the [elimination of the] referendum, give reasons for such position." Sewell replied that he had not discussed the referendum with local lodges, but had done so with many individual members, urging that the referendum not be eliminated. On January 4, Siemiller discharged Sewell for actively supporting the referendum and thereby refusing to carry out the decision of the Executive Council. (Footnote omitted) 418 F.2d at 1004-5.

Dealing specifically with Sewell's discharge, the court further found:

> The record clearly shows that Sewell had knowledge of the IAM's desire to have the amendment passed and its dependence upon Grand Lodge representatives (including Sewell) to support actively the amendment's passage among IAM members. With

employed by the Union for more than fifteen years in various capacities.[6] At all times he has been a member of the union in good standing. During the particular time involved in this litigation, from 1966 until January 6, 1967, Sewell was employed by the Union in the position of Grand Lodge Representative. In this capacity it was his responsibility to perform the usual functions of the union in the field; he organized and serviced problems of the local unions, handled their grievances, and negotiated their contracts. Beyond these duties it was Sewell's primary responsibility to promote and execute the policies of the Union's Executive Council and its International President, P. L. Siemiller.

On December 22, 1966, Sewell received a letter from President Siemiller which made reference to reports that he (Sewell) was actively opposing a proposal of the executive council of the Union.[7] Since a referendum on the proposal in question was to be held in January 1967, President Siemiller in his letter requested Sewell "to report to this office if you have been advising local lodges to vote against the proposition in January; and if you have been opposing the Referendum,

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this knowledge, Sewell actively opposed the amendment. For his opposition Sewell was discharged for insubordination. 418 F.2d at 1008-9.

[6]Sewell has served as a special union representative, as an aide to the general vice president of the southern territory, as acting general vice president in charge of the union's southern territory, and as Grand Lodge Representative.

[7]The proposal in question sought to eliminate from the Union's constitution the requirement that all proposed amendments to the constitution must be submitted to the rank and file of the local unions for approval.

give the reasons for such position." Appellant responded to President Siemiller's letter that he had discussed the referendum with "many individuals in an opposing approach, not with local lodges." Following this response, on January 4, President Siemiller discharged Sewell for actively supporting the referendum and thereby refusing to carry out the decision of the Executive Council.[8] Sewell's membership in the Union was not disturbed.[9]

Statute of Limitations

In view of the foregoing facts we consider first, the Union's contention that Sewell's claim is barred by the applicable Alabama statute of limitations.[10] Ini-

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[8] In his January 4th letter President Siemiller wrote as follows:

> Your position, as stated in your December 27, 1966, letter, together with admitted actions, is insubordination. Therefore, for this reason, your employment with the International Union is terminated immediately upon receipt of this letter.

[9] In paragraph 2 of his complaint Sewell alleges:

> Plaintiff is a member of the International Association of Machinists and Aerospace Workers, and has been such at all times relevant herein, holding membership card No. X-82323.

[10] In its motion to dismiss, the Union relied upon and pled the Alabama Statute of Limitations of one year. Sewell did not amend or seek to amend his complaint to meet this defense. See Ancora Corp., et al. v. Stein, et al., ——— F.2d ——— (5th Cir. 1971) [No. 30227, June 14, 1971].

The nature of Sewell's cause of action is succinctly stated in his complaint as follows:

> 4. This action is instituted for the purpose of obtaining appropriate relief against the defendant union on account of its malicious, wanton, and reckless disregard of rights secured to plaintiff by Sections 101 (a) (1) and (2) (29 U.S.C. Sections 411 (a) (1) and (2)) of said Act, 73 Stat. 522.

tially, we note that the Act upon which the appellant relies does not contain a statute of limitations. In such circumstances federal courts must rely on the limitations period prescribed by the state in which the litigation arose; in this case, Alabama. The applicable period of limitation is that which Alabama would have enforced had an action seeking similar relief been brought in the Alabama state courts.[11] To resolve this question, we must first determine the "essential nature" of the claim under the federal law and then decide what statute of limitations the state courts of Alabama would hold applicable to this type or class of action.

The Union insists that Sewell's action is *ex delicto*, an action for injury to personal rights guaranteed by law, and, therefore, subject to the one year Alabama

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10. Plaintiff claims that said action of the defendant in so disciplining plaintiff was malicious, wanton, and in reckless disregard of the right secured to plaintiff as a member of said union by Section 101 (a) (1) (29 U.S.C. Section 411 (a) (1)) of said Act, to possess equal rights and privileges with other members of said Association to vote in referendums of said Association as he might choose, and of plaintiff's right as such member, secured to him by Section 101 (a) (2) (29 U.S.C. Section 411 (a) (2)) of said Act, to meet and assemble freely with other members and to express any views, arguments, or opinions; and that the action of defendant in disciplining plaintiff by depriving him of said employment for exercising his statutory rights is and was unlawful as being in violation of Section 609 (29 U.S.C. Section 529; 73 Stat. 541) of said Act.

[11] Board v. Stephens, 373 F.2d 685 (9th Cir. 1967). See also McGuire v. Baker, 431 F.2d 895, 898 (9th Cir. 1970); Baker v. F & F Investment, 430 F.2d 1191, 1193 (7th Cir. 1970).

statute of limitations for tort actions.[12] Sewell, on the other hand, contends that his action is *ex contractu* and that the Alabama statute of limitations of six years should apply.[13] In examining these contentions we must rely on Sewell's complaint[14] and the undisputed facts, while adverting to the guide line of the Alabama Supreme Court in *Adler v. Miller*[15] for testing whether a cause of action is *ex contractu* or *ex delicto:*

> If the cause of action given expression in the complaint (1) arises from a breach of promise, the action is *ex contractu*, or (2) if that cause of action arise from a breach of duty ... it is in form, *ex delicto* and case.[16]

Examining Sewell's complaint we note at the outset that no mention is made of a contract.[17] He alleges

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[12]See note 3. In this case Sewell was discharged on January 4, 1967; he commenced the present action on April 10, 1970.

[13]Ala. Code Title 7, § 21 (1958).

> Section 21. Limitations of six years. —
> The following must be commenced within six years
> ...
> Actions upon any simple contract or speciality, not herein specifically enumerated.

[14]See Chambers v. Birmingham Trust & Savings Co., 232 Ala. 609, 168 So. 893 (1936).

[15]218 Ala. 674, 120 So. 153 (1928). See also Marsh v. Southern Airways, 316 F.2d 91 (5th Cir. 1963).

[16]Adler v. Miller, 218 Ala. 674, 675, 120 So. 153, 154 (1928).

[17]If he relies on a contract there are no allegations that the contract is in writing. If the contract were oral, it might run afoul of the Alabama Statute of Frauds. If so, appellant could not rely on the Alabama Statute of Limitations to protect a void contract. For the Alabama Statute of Limitations to apply, appellant must allege and prove a valid contract under Alabama law. See generally: Tennessee Coal, Iron & Railroad Co. v. Sizemore, 256 Ala. 344, 62 So.2d 459 (1953); Grand International Brotherhood v. Couch, 236 Ala. 184 So. 173 (1938).

membership in the Union and employment by it in various capacities from time to time over a period of fifteen years. However, none of the terms, conditions, or provisions of the employment arrangement are set forth[18] and there does not appear to be any reliance on the terms of any particular contract. He does not allege whether the employment arrangements were oral or in writing; nor does he specify the period of employment, the specific duties to be performed, the authority of the employer, his own rights as an employee, or any other pertinent factors necessary to support an action based on contract.[19] Additionally, from the facts set forth above in this opinion, which are without any material dispute, it is quite clear that the basis of Sewell's alleged grievance is the claimed denial of rights protected by federal law. In view of the undisputed facts and the allegations in Sewell's complaint, it is our conclusion that his claim is essentially in the nature of a tort for the alleged violation

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[18] In the *Nix* opinion it appears that Grand Lodge Representatives were assigned varying duties from time to time and that such duties were terminated and other duties assigned by executive officers of the Union. The Union is a large organization with headquarters in Washington, D.C. At one time there were eight administrative territories with an elected vice-president serving each territory. There were approximately 230 Grand Lodge Representatives, special representatives and press representatives. These representatives served the Union in the field or organizing, assisting local unions, handling grievances and negotiating contracts. They were under the direction of each regional vice-president. Their duties were to promote and execute the policies of the Union President and Executive Council at all times.

[19] See Tennessee Coal, Iron & Railroad v. Sizemore, 258 Ala. 344, 62 So.2d 459 (1953) (quoting 17 C.J.S. Contracts, § 549 p. 1177). See also Grand International Brotherhood v. Couch, 236 Ala. 611, 184 So. 173 (1938).

of rights claimed under the Labor Management Reporting and Disclosure Act. Accordingly, we conclude that his cause of action is governed and barred by the Alabama Statute of Limitations of one year.[20]

Insubordination

Even if Sewell's complaint was not barred by the statute of limitations, we are of the opinion that he should be denied relief. We fully concur with his contention that each member of a labor union is guaranteed the right of free expression as well as the right to participate freely in the union's democratic processes. Disciplinary action for the exercise of such rights offends the terms of the Labor Management Reporting and Disclosure Act. Moreover, the rights of free expression, and assembly as well as other rights protected by the statute may be exercised fully and freely by any member of the union; the mere fact that a member is an appointed or elected official of the union does not destroy his statutory rights.[21] This con-

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[20] In reaching our conclusion we have given full consideration to the rule obtaining in this Circuit which frowns upon summary dismissal of complaints on purely technical grounds and favors the liberal construction of complaints. See Spalitta v. Nat'l. American Bank, ____ F.2d ____ (5th Cir. 1971) [No. 29622, May 26, 1971]; Merlite Land v. Palm Beach Invest., 426 F.2d 495 (5th Cir. 1970); Allen v. Johnson, 391 F.2d 527 (5th Cir. 1968.

[21] Grand Lodge of Internat'l Ass'n. of Machinists v. King, 335 F.2d 340 (9th Cir.), cert. den. 379 U.S. 920, 13 L.Ed.2d 334 (1964); Fulton Lodge No. 2 of Int. Ass'n of Mach. & Aero Wkrs. v. Nix, 415 F.2d 212, 217-218 (5th Cir. 1969); Giordani v. Upholsterers Int. Union of No. Amer., 403 F.2d 85, 89 (2d Cir. 1968); Salzhandler v. Caputo, 316 F.2d 445 (2d Cir.) cert. denied 375 U.S. 946, 11 L.Ed.2d 275 (1963); Cefalo v. Int. Union of Dist.

clusion, however, does not permit an employee who accepts employment for the performance of certain specified duties to take the largesse and pay of the union, on the one hand, and, on the other, to completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties.[22] As Judge Bell observed in *Airline Maintenance Lodge 702 v. Loudermilk*:[23]

> The rights of a union member under this statute must be balanced against the right preserved to the union to make rules as to the responsibility of the member toward the union as an institution. And this balancing process must rest on the facts.

To permit an individual to accept union employment, to receive union pay, and to enjoy the prestige of a union position, while spending his employer's time opposing the plans and policies he was employed to exe-

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50 United Mine Wkrs, 311 F. Supp. 946 (D.C. 1970); DeCampli v. Greeley, 293 F. Supp. 746, 749 (D. N.J. 1968); Gullickson v. Forest, 290 F. Supp. 457, 464 (E.D. N.Y. 1968).

As Judge Godbold indicates in Felton Lodge No. 2 of Int. Ass'n of Mach & Aero Wkrs v. Dix, supra, at 217, especially n.11, the cases indicate a distinction between union-employee and union-officer rights under the Act as compared with "union-member" rights. See also Nelms v. United Ass'n of Journeymen & App of Plumbing, 405 F.2d 715 (5th Cir. 1968); Saltzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963); Seeley v. Brotherhood of Painters, 308 F.2d 52 (9th Cir. 1962); Sheridan v. United Brotherhood of Carpenters, 308 F.2d 182 (3d Cir. 1962).

[22] See: Nelms v. United Ass'n of Journeymen & App. of Plumbing, 405 F.2d 715 (5th Cir. 1968).

[23] ____ F.2d ____ (5th Cir. 1971) [No. 30728, June 1971].

cute, would in our judgment, be unreasonable. All employees, whether they work for a union or a large commercial company, may be required at times to subordinate personal expression to the responsibilities of their employment. An essential and elemental ingredient of all employment is basic loyalty by employees to the employer in performing the duties of the job for which they were hired.[24] If a conflict of interest arises between an individual's desire to oppose the plans and policies of his employer and the discharge of the duties of the position in which he is employed, fundamental considerations of fair play would require him to remove himself from such a position.[25]

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[24] In N.L.R.B. v. Local Union No. 1229, 346 U.S. 464, 472 (1953) Mr. Justice Burton speaking for the Court observed: "There is no more elemental cause for discharge of an employee than disloyalty to his employer." See also, *e.g.*, Goldwasser v. Brown, 417 F.2d 1169, 1176 (D.C. 1969); Guleckson v. Forest, 290 F. Supp. 457, 464 (E.D. N.Y. 1968).

[25] In Nix v. N.L.R.B., 418 F.2d 1001 (5th Cir. 1969) this court concluded:

> Petitioners contend that, even assuming Sewell was discharged because of his opposition to the amendment, his discharge still violates sections 8(a) (1) and 8(a) (3) for three reasons. They first contend that Sewell was exercising his membership rights as a member of IAM and cannot be discharged for exercising these rights. Under their contention, Sewell could oppose the amendment as an individual member of the IAM, even though as an employee of that union his duty was to support actively its passage. This contention seems to be without adequate foundation. Actual conflicts of interest arising from an individual's dual status as union member and employee may properly be resolved in favor of the employer's right to operate its business and to discharge employees for cause.

The Union argues vigorously in this court that the issues presented in the instant case have already been adjudicated

To hold that a union has no right to discharge an employee for insubordination under the facts of his case would, we believe, seriously detract from effective, cohesive union leadership. The result might well be weak, ineffective and fragmented unions which would be paralyzed in bargaining for the rights and welfare of union members against the monolithic front of large commercial corporations in the modern commercial world. For this very reason it has long been the philosophy of collective bargaining and other vital union activities that the union representing the employees should be able to bargain on equal terms with employers whose economic interests are often diametrically opposed.[28]

Considering all the facts involved, it is our conclusion, limited to the particular facts and circumstances of this case, that the Union had the right to terminate the appellant's employment for insubordination.

AFFIRMED.

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in our *Nix* decision. It relies on the principle of collateral estoppel and res judicata. See Blonder-Tongue Laboratories v. Un'v. of Illinois Fd., ____ U.S. ____, 28 L.Ed.2d 788 (1971); Ashe v. Swenson, ____ U.S. ____, 25 L.Ed.2d 469 (1970); Tampa Phosphate RR Co. v. Seaboard Coast Line RR Co., 418 F.2d 387 (5th Cir. 1969); Seguros Tepeyac, S.A. v. Jernigan, 410 F.2d 718 (5th Cir. 1969); 1B Moore ¶33 ¶0.405[3]. The record does not disclose that this issue was presented in the district court and therefore we decline to consider it here. See Barrett v. Browning Arms Co., 433 F.2d 141 (5th Cir. 1970); Nix v. NLRB, *supra* at 1009.

[28] See Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 731 (5th Cir. 1970).

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